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CURRENT TOPICS.

THERE is no lien, it was held in the United States Circuit Court for the District of Tennessee, in *The John T. Moore*, 7 Ins. L. J., 207, upon a vessel for the premium for its insurance by the owners for their own benefit. It is a contract with the owner for his own benefit. It does not aid the vessel. In case of loss the maritime liens upon the vessel are displaced, and do not follow the insurance money. The money goes to the owner for his own benefit, and not to the lien-holder, who may insure his own interest. Thayer v. Goodale, 4 La. 222; Steele v. Franklin Fire Ins. Co., 17 Penn. St. 290; Turner v. Stetts, 28 Ala. 420; White v. Brown, 2 Cushing, 412; Stillwell v. Staples, 19 N. Y. 401; Stark v. Brown, 7 La. Ann. 342.

IN *Provost v. Gorrell*, 8 Pitts. L. J. 125, in the United States Circuit Court for the Eastern District of Pennsylvania, a verdict having been obtained by the plaintiff in the Circuit Court for the Western District, and a certified copy of the record being filed in the clerk's office in the Eastern District, he moved for an order directing the clerk to issue an attachment in execution upon the certified copy of the record filed in that court. MCKENNAN, Circuit Judge, said: "This is a new question of practice, and is not perfectly clear. It depends upon what is meant by 'similar remedies' in section 915 of the Revised Statutes. The act from which that clause is taken was passed in 1873, while section 985 is taken from an act passed in 1826. As by the latter act all writs of execution may be executed throughout the state (where the state is divided into several districts), it would seem more reasonable to suppose that the clause of the subsequent act of 1872 was meant to give to the plaintiff the additional advantage of the writ of attachment (whether as a writ of execution or not) where it had not before been enjoyed, in which case the meaning of the statute would be that the plaintiff was entitled to similar writs of attachment as in the state court, but not necessarily to a completely similar use of the writ, as is contended here. This we decide to be the meaning of the statute where, as here, the plaintiff has a complete remedy under section 915, combined with section 985, without discussing the question of its meaning where the latter section does not apply, as where the districts are in different states. Under this view, the plaintiff's lien on the defendant's real estate in the Eastern District depends not upon the certified copy he has filed here, but upon the original judgment he has obtained in the Western District, and goes back as to all real estate situated in that district to that date; for the right of lien depends upon the right of execution; and, as all writs of execution, which the plaintiff had a right to issue on his judgment, might 'run and be executed in all parts of the state,' by section 985, this lien was equally operative from the same date upon real estate situated in all parts of the state. Massingill v. Downs, 7 How. 768."

A novel action—it was said by the counsel on the argument to be without precedent—was the case of *Hahn v. Smart*, recently before the Queen's Bench Division of the English High Court of Justice. It was an action against a trustee in a liquidation in bankruptcy for maliciously preventing the debtor's discharge and fraudulently retaining his property. The plaintiff was a foreign merchant, who went into liquidation, and the defendant, an accountant, was appointed his trustee. The plaintiff complained that after a compromise had been accepted and paid, and when he was entitled to his discharge, the defendant, as trustee, had maliciously refused to call a meeting of the creditors for the purpose, had fraudulently bought up debts in order to get nominal creditors to oppose the discharge, whereby he had been prevented from obtaining his discharge or from carrying on business; and he claimed £1,000 damages, and also an account. The defendant in reply set up that all the proceedings to the liquidation, and the conduct of the trustee therein, were subject to the control of the Court of Bankruptcy, and were not within the jurisdiction of this court, and asked the court to set aside or stay the proceedings, as instituted without jurisdiction and without leave of the Court of Bankruptcy. The court, after lengthy argument, refused to

stay the proceedings, holding that if the trustee did acts which were illegal and wrongful, he was liable to be sued in a court of law, and was, of course, liable to pay the costs of such an action, which could not be payable out of the assets of the debtor, as the very ground of the action was the trustee's wrongful act. All that the Court of Bankruptcy had to do was to take care of and administer the property. If the trustee chose to brand the debtor as a swindler, the Court of Bankruptcy could give no redress, and the debtor could bring his action in the courts of common law. The application could only be supported on the ground that, however malicious and illegal the conduct of the trustee in a bankruptcy or liquidation, the debtor could not maintain an action, even for a personal injury to himself —at all events, without the leave of the Court of Bankruptcy; but such a view could not be maintained, and in such a case an action could be maintained with or without the leave of the Court of Bankruptcy, which, indeed, had nothing to do with such cases of complaint.

THE effect of illness caused by imprudence, as an excuse for the non-fulfillment of a contract for personal service, was considered in a recent case in the Exchequer Division of the English High Court of Justice, *K—— v. Raschen et al.*, 38 L. T. R., (N. S.) 38. The plaintiff was engaged by the defendants as a clerk at a yearly salary, and was to have one month's notice of dismissal. He served under the contract from the 2d to the 30th of July, when, being unwell, he obtained defendants' permission to absent himself until the 6th of August. He remained away, however, until the first week in September, when he returned and tendered his services, which the defendants refused; and they had, moreover, in the meantime, namely, on the 20th August, given him a notice, by letter of that date, terminating the employment. They refused to pay him the amount claimed by him for wages during his absence, on the grounnd that he had, by his own misconduct, rendered himself incapable of performing his duties, and, therefore, was not entitled to any remuneration. The illness under which the plaintiff was suffering arose from venereal disease. He thereupon brought an action for his wages from the 1st of August to the 1st of September, but was non-suited in the court below. On appeal the non-suit was set aside and a verdict entered for the plaintiff. CLEASBY, B., said: I think *prima facie* illness is to be attributed to the act of God, and we are not justified in going back for any length of time, and entering into an investigation as to what may have been the cause of it. We ought not, I think, to extend the effect of disability arising from illness. The illness which rendered him unable to perform the duties for a time, came upon him unexpectedly, and we can not go back to the first causes and into the question of how it arose. The maxim, "*causa proxima non remota spectatur*," is applicable here. As to how precisely the disease arose, there may be various different opinions, and there might be the greatest uncertainty as to the cause or matter which originally brought it about. It was a misfortune which could not have been foreseen at the time the contract was made, and I think the plaintiff is entitled to say that it is a reasonable excuse for his absence from his duties. HAWKINS, J.—I am of the same opinion. If the plaintiff had been aware, at the time of the making of the contract, that he would be incapacitated by illness from performing his duties, I am not prepared to say that he could recover in this action. But there is nothing to show that he knew any thing of the illness which he subsequently suffered from until after the agreement had been entered into. There was no cross-examination on that point, and no question was put to get out of him, and there was no evidence to show that he had any suspicion of the misfortune which subsequently overtook him, or that he was aware that the seeds of the disease existed in him at that time. Now I base my opinion upon that fact, and, I think, under these circumstances, that he is entitled to the amount claimed. The misconduct alleged in the pleadings is his staying away without a reasonable excuse. How can it be called misconduct if a man stays away, on the advice of a doctor, in order to get himself cured? Now, in the present case, the plaintiff did not voluntarily and willfully refuse to serve, but was compelled to absent himself by an illness which came upon him during the time of service, and which was not the result of any misconduct that occurred after the agreement was made. As a

matter of fact, I conclude that the malady was contracted before he entered into the defendants' service; and he did not improperly obtain admission there. At the time that he entered into the contract, which he did honestly, he neither believed nor knew that he would not be able to fulfill it.

THE DEGREES OF MURDER. III.

There are some legal fictions which have been handed down to us from the scholastic jurisprudence, dignified as "legal presumptions," an adherence to which will keep the judicial mind in a state of confusion; and none are more fruitful in leading the mind into a judicial quagmire, than the old view that malice and intent are by law presumed to exist when a certain state of facts is proved. Our Missouri rule has it: "If A shot and killed B, the law presumes it is murder in the second degree (some add in the absence of proof to the contrary) and it devolves upon the accused to show that he is guilty of a less crime or acted in self defense." State v. Hays, 23 Mo. 287; State v. Holme, 54 Mo. 153; State v. Underwood, 57 Mo. 40; State v. Foster, 61 Mo. 549; State v. Evans, 5 Cent. L. J. 12. I ventured to state in a note to the last case (5 Cent. L. J. 14) that this Missouri doctrine is an adulteration of the doctrine of a majority of the court in the case of Com. v. York, 9 Metcalf, 93. In that case the instruction to the jury, in this respect, was: "The rule of law is, when the fact of killing is proved, and nothing further is shown, the presumption of law is, that it is malicious and an act of murder." This rule was reaffirmed in Com. v. Webster, 5 Cush. 305, where the court, after stating the rule, adds: "It is material to the just understanding of this rule, that it applies only to cases where the killing is proved and *nothing further is shown.*" Again, in Com. v. Hawkins, 3 Gray, 463, Shaw, C. J., remarked that "the doctrine of York's case was, that where the killing is proved to have been committed by the defendant, and *nothing further is shown*, the presumption of law is that it was malicious and an act of murder; and that this was inapplicable to the present case, where the circumstances attending the homicide were fully shown by the evidence." This doctrine of the York case, so well grounded in Massachusetts, will answer very well as a harmless theory for no such case as the fact of killing "*where nothing further is shown*," is likely to ever occur in practice. But even as a theory it has not the support of reason. Whar. on Hom. 2 Ed. 664, 669.

But the Missouri adulteration of the doctrine, as I understand it, selects from every homicide, however numerous the facts and circumstances attending it, the abstract fact of the killing, and requires this fact to be loaded with the legal presumption of malice, and hence murder in the second degree; and of all the facts and circumstances in proof, this one fact must be considered as of greater weight than any other fact in the case. It must not be weighed as other facts are weighed—inferences are not to be drawn from this fact by the jury, as from other facts in the case—but they are compelled, by arbitrary instructions from the bench, to weigh it, not according to its true weight as an important fact in the case, but as one loaded and weighted by a legal fiction. And not only so, but the cases say: "It devolves on the accused to show that he is guilty of a less crime or acted in self defense," thus shifting the burden of proof upon the accused, which is contrary to all the leading American authorities.

In the case of Com. v. Drum, 58 Penn. St. 9, Judge Agnew, in delivering the opinion of the court, an extract from which is copied into the opinion in State v. Holme, 54 Mo. 162, states the true doctrine of this subject with great clearness. He says: "The proof of the intention to kill, and of the disposition of mind constituting murder in the first degree under the act of the Assembly, lies on the Commonwealth. It may be inferred from the circumstances. If, from all the facts attending the killing, the jury can fully, reasonably and satisfactorily infer the existence of the intention to kill, and the malice of heart with which the act was done, they will be warranted in so doing." Mr. Wharton, in his work on Homicide, so frequently referred to, says: "It is therefore announcing a proposition purely speculative and irrelevant to tell the jury that an abstract killing involves, as a matter of law, an abstract intent. It is perfectly proper, however, to tell the jury that from certain circumstances—*e. g.*, a deadly weapon, repeated and dangerous wounds, threats

—intent and malice may be rightfully inferred as inferences of fact. * * * * Now, as the facts of killing are always proved, the idea of abstract malice being presumed from abstract killing, has no application to the cases before the court. It is a speculation like the speculations of the old school-men, from which it is taken, * * * * speculations which roam over all creation without possibly touching any real case." Wh. on Hom., 2 Ed., Sec. 669. The Massachusetts doctrine may be treated as a harmless theory, inapplicable to all cases, like the case of Com. v. Hawkins, *supra*, where the circumstances attending a homicide are fully shown by the evidence; but the Missouri doctrine is arbitrary and unreasonable, and exceedingly pernicious in its influence, thrusting itself, as it does, into every murder trial in the state.

Another error which has crept into our Missouri decisions, is the definition of *malice*, as applied in trials for homicide. It is that "malice as known to the law does not mean mere spite, ill-will or dislike, as it is ordinarily understood, but as applicable to this case, it means the intentional doing of a wrongful act without just cause or excuse." State v. Joeckel, 44 Mo. 234; State v. Schoenwald, 31 Mo. 147. I accept the criticism of this definition by the learned judge in Wieners' case, *supra*, as conclusive. That part of the definition supplied by the judge as follows: "Malice is a condition of the mind, the existence of which is inferred from acts committed or words spoken," is literally correct. "It is a condition of the mind which shows a heart regardless of social duty, and fatally bent on mischief." This is also correct as describing the mere state of the mind, and if we add the concluding words of the preceding sentence, viz.: "The existence of which is inferred from acts committed or words spoken," we have a definition at once clear and comprehensive and as correct as the authorities afford.

But another error has enthroned itself in our Missouri decisions, which has tended more to the confusion as to murder in the second degree, and to blotting out the line of distinction between the two degrees, than anything else, which is, that our courts have practically ignored the terms "*deliberate*" and "*premeditated*," as found in the first section of the statute. In State v. Joeckel, 44 Mo. 234, the instruction which the Supreme Court approved, on the point now under consideration, is as follows: "The distinction between murder in the first degree and murder in the second degree lies in the intention with which the act was done. Where a homicide has been committed and there was an intent to do the act, then * * * it is murder in the first degree. But if the party killing did not intend to kill but assaulted and killed with malice, then the offense is murder in the second degree." If this proposition, as it presents itself to the ordinary mind, is the law, then the first section of the statute, which tells what murder shall be deemed to be in the first degree, is not, for the two can not stand together; and yet we find similar instructions to that in Joeckel's case, *supra*, being given by the most distinguished criminal jurists of the state. See Gassett's case, not yet published.

If the distinction between murder in the first and murder in the second degree lies in the intention with which the act was done, then every murder intentionally committed is in the first degree. If this is true, then there are but two essential ingredients in murder in the first degree—*malice* and *intention*. The statute contains two additional elements as necessary as malice itself, *deliberation* and *premeditation*. In Joeckel's case, *supra*, these two elements are wholly ignored, thus setting at naught a plain provision of the statute. I admit that the intention to kill is the essence of the crime of murder in the first degree, as known in the statute by general description; but I have shown that there may be a malicious killing with intent to kill, which would constitute murder in the second degree, and if this be true the distinction does not lie in the intention with which the act of killing was done.

I have found no clearer statement of the true doctrine than that of Judge Agnew in Com. v. Drum, *supra*, where he says: "In this case we have to deal only with that kind of murder in the first degree described as willful, deliberate and premeditated. Many cases have been decided under this clause, in all of which it has been held that the intention to kill is the essence of the offense. Therefore, if an intention to kill exists, it is willful. If this intention be accompanied by such circumstances as evidence a mind fully conscious of its own purpose and design, it is

deliberate; and if sufficient time be afforded to enable the mind fully to frame the design to kill, and to select the instrument, or to frame the plan to carry this design into execution, it is premeditated." See State v. Holme, 54 Mo. 162.

Again, the line between murder in the first and murder in the second degree has been partially obliterated by the courts instructing, as matter of law, that a *moment* is time enough for the deliberation and premeditation necessary to constitute murder in the first degree. In State v. Wieners, *supra*, the court quotes from the author as follows: "The law assigns no limit within which the cooling time may be said to take place—every case must depend on its own circumstances." The court further says: "A purpose to kill may be conceived and deliberately executed, although but a very brief time elapse between the conception and the execution of the purpose." Judge Agnew, in Com. v. Drum, *supra*, on this point says: "The law fixes upon no length of time as necessary to form the intention to kill, but leaves the existence of a fully formed intent as a fact to be determined by the jury from all the facts and circumstances in the evidence." Judge Wagner, after quoting with apparent approval a lengthy paragraph from the opinion of Judge Agnew, from which I have made the two quotations above, in State v. Holme, *supra*, approves an instruction which told the jury "that if the party killing had time to think, and did intend to kill for a moment as well as an hour or a day, then such killing is deliberate, willful and premeditated killing." If, as Judge Agnew says, "the law fixes upon no length of time as necessary to form an intention to kill, but leaves the existence of a fully formed intent as a fact to be determined by the jury from all the facts and circumstances in evidence," then is not an instruction which tells the jury, as matter of law, that a *moment*—which is the most minute and indivisible part of time—is sufficient, erroneous?

The question as to what time it takes a man of ordinary capacity to deliberate (which is defined—to weigh in the mind, to consider, and examine the reasons for and against a measure), and to premeditate (which is defined—to think, consider, or resolve in the mind beforehand—Webster), would, perhaps, puzzle the most astute thinkers of the age; and to declare, as a matter of law, that it may all occur, in the average mind, in a *moment*, is, to my mind, arbitrary and unreasonable; and, if so, it is not the law. The question is wholly freed from difficulty when we adopt the rule laid down in Wieners' case, *supra*, that, in this respect, "every case must depend upon its own circumstances,," or, as stated by Judge Agnew, in Com. v. Drum, *supra*, that the law "leaves the existence of a fully formed intent as a fact to be determined by the jury from all the facts and circumstances in evidence." Deliberation and premeditation are essential ingredients. The question is, was the killing deliberate and premeditated? Whether it was or not is a question of fact for the jury. The question is not how long it requires to deliberate and premeditate; but was the act a deliberate and premeditated act?

Some of the adjudications of our Supreme Court, which I have presumed to designate as errors, have been re-examined by our present court, and some of the errors which I have pointed out, have been eradicated, and the old rules modified to some extent; and that the court is inclined to re-examine the whole ground, the decisions in the Wingo, Alexander, Gassett, Wieners, and other cases, decided at the past October term, give evidence; and that the final conclusions reached will be more in harmony with modern thought, and more in consonance with reason and modern authority than some of the former adjudications, is to be expected. J. H. S.

BANKRUPT ACT—MEANING OF "TRADESMAN."

RE STICKNEY.

United States Circuit Court, Eastern District of Missouri March Term, 1878.

Before HON. JOHN F. DILLON, Circuit Judge.

1. THE WORD "TRADESMAN," in Section 5110 of the Revised Statutes of the United States, has a very limited signification. The expression is imported from the English bankruptcy act, and means a smaller merchant or shopkeeper.

2. WHERE A FIRM which became bankrupt had been, as large stockholders, connected with, and were the principal officers of a manufacturing corporation not in bankruptcy: *Held*, that such connection did not of itself constitute the bankrupts merchants or tradesman, and that, although outside of the business of the corporation they borrowed largely and owned a farm and carried on business in connection therewith, but did not carry on any business of merchandising, or hold themselves out to the community as

merchants, they were not "merchants or tradesmen," within the meaning of the law, and their failure to keep "proper books of account" was not ground for refusing a discharge in bankruptcy.

This was an appeal from the District Court of the United States for the Eastern District of Missouri, brought to this court on a petition for review filed by the bankrupt. Seven specifications were filed in the District Court against the discharge of the bankrupt, all of which, with the exception of the fifth, were overruled by the District Court. Said fifth specification was based on the seventh sub-division of section 5110, of the United States Revised Statutes, which provides that no discharge shall be granted, or, if granted, shall be valid, "if the bankrupt, being a merchant or tradesman, has not, at all times, after the second day of March, 1867, kept proper books of account." The District Court held that the bankrupt was a merchant or tradesman, within the meaning of the bankrupt act, and that he had failed to keep proper books of account, as prescribed by said act, and accordingly refused to grant a discharge to the bankrupt. The bankrupt was a partner of one E. T. Merrick, under the firm name of Merrick & Stickney, both of whom were adjudged bankrupts. The discharge of both bankrupts was refused on the ground above stated, and Mr. Merrick having meanwhile died, Mr. Stickney appealed to this court.

Merrick & Stickney were adjudged bankrupts on a creditor's petition filed in November, 1873. The character of their business was disclosed by the testimony of Mr. Merrick, on the hearing of the opposition to the discharge. That testimony was, so far as material to the point decided, as follows, to wit:

"Mr. Stickney and myself came to St. Louis in the year 1858 and formed a law copartnership, and practiced law for about a year. We then quit the law business and directed our attention to the buying of and dealing in land warrants. We were partners from the time we came to St. Louis until our bankruptcy in 1873. Our business since 1866 has been exclusively that of farmers and manufacturers. From 1859 to the end of 1866 we dealt largely in land warrants and government vouchers. We had many friends in the East who loaned us money with which to carry on this business. These friends could get only six or seven per cent. interest on their money in the East, and we allowed them ten per cent. on the moneys they advanced. We entered a large amount of Kansas lands ourselves, and gave mortgages thereon to those who had advanced us money. We had a large tract of land in St. Charles County, Missouri, on the drainage of which we spent large amounts of money, between $20,000 and $30,000, which, at one time, made these lands of great value, but owing to a blunder of engineering these lands were flooded and became enormously depreciated in value. This loss, and the financial panic of 1873, brought us to bankruptcy. These lands were farmed by myself and my partner, Mr. Stickney. We also owned land in Cahokia, Illinois, which we also farmed ourselves. Since 1866, Merrick and Stickney have not traded in land warrants, nor have we since then bought any lands,—at least we have not made a business of buying lands, but have since sold some of the lands we then owned. We have since then received loans, for which we gave mortgages on the lands owned by us, or secured such loans by pledges on our stock in the stoneware company, and we also received loans on our personal credit. Our business as manufacturers has been exclusively connected with the St. Louis Stoneware Company, a corporation organized under the laws of Missouri. Both Mr. Stickney and myself were officers of the corporation, and he and I were the principal stockholders. We have, since the organization of this company in 1865, devoted the greater part of our time to the business of that company. That company kept separate books of account, entirely unconnected with the business of Merrick and Stickney. The company employed a regular bookkeeper. and its books have been regularly kept. Said company has not gone into bankruptcy, but still carries on business. The books of Merrick and Stickney, taken altogether, show all the moneys received and paid out, to the best of my belief. There may have, of course, been omissions, but if so, those omissions were entirely through inadvertence."

For the bankrupt it was contended: (1) that neither he nor his firm were merchants or tradesmen, within the meaning of the bankrupt law; and (2), that the books of account were properly kept. His counsel urged that a trader is one who makes it his business to buy merchandise, or goods and chattels, and to sell the same for the purpose of making a profit, and cited the following authorities on the first point: 2 Bouvier's Law Dictionary, 604; Heane v. Rogers, 4 Mann. & R. 486; Sutton v. Wheeley, 7 East. 441; *In re* Cote, 14 N. B. R. 503; *In re* Rugsdale, 16 N. B. R. 215. And on the second point bankrupt's counsel cited the following authorities: *In re* Solomon, 2 N. B. R. 285; *In re* Newman, *Ibid.* 302; *In re* White, 3 N. B. R. 590; *In re* Batchelder, *Ibid.* 150; *In re* Winsor, 16 N. B. R. 152.

For the opposing creditors it was contended that the bankrupt was within the meaning of the law, and that the action of the District Court in refusing the discharge was proper.

Seneca N. Taylor, for the opposing creditors; *Walker & Walker*, for the bankrupt.

DILLON, Circuit Judge:

I am prepared to decide the case of Stickney before me, on appeal from an order of the district court, refusing to grant Mr. Stickney a discharge in bankruptcy.

It seems that for some years Merrick & Stickney were partners in this city. The record is a little meager, but I gather from it this state of affairs: Merrick & Stickney were connected largely with a corporation formed under the statutes of the state, known as the St. Louis Stoneware Company, engaged in the business of manufacturing and selling stoneware; and they were the largest stockholders. Both bankrupts were officers—one president, and the other, I believe, secretary—of the

corporation; and they were the largest, but not the only stockholders. The corporation is not in bankruptcy, Merrick & Stickney being the bankrupts. Mr. Merrick is now dead. The district court refused Mr. Stickney a discharge, solely on the ground that he was a tradesman, and had failed to keep proper books of account.

There were other objections to the discharge contained in the specifications, based on the ground of fraud. They were overruled as not being sustained, and no appeal was taken therefrom. But the fifth specification was to the effect that Merrick & Stickney did not keep proper books of account. The provision of the bankrupt act is that if any merchant or tradesman has not, since March 2, 1867—the date of the passage of the bankrupt act—kept proper books of account, it is sufficient ground of objection to his discharge. It makes no difference, under the bankrupt act, whether or not the failure to keep proper books is through inadvertance, negligence or fraud; it is sufficient ground for refusing his discharge, provided the bankrupt is a merchant or tradesman.

From what counsel stated on the argument, the chief emphasis and stress in the court below was upon the question whether the books that were actually kept were proper books. I have not those books before me, and if the case turned on them, I would be obliged to hold that there was not sufficient certainty that the books were proper books, to justify a reversal of the decision of the district court. Accordingly, the case turns on the question whether, under the circumstances, these bankrupts were merchants or tradesmen within the meaning of the bankrupt act. Now, all that the record discloses in this behalf is this: These men were large stockholders, and were main officers in a corporation formed for the purpose of carrying on the business of manufacturing and selling stoneware. Now, I conceive that whether or not that corporation kept proper books is perfectly immaterial here, and it has not been attempted to show that it did not keep proper books of account, and, indeed, it was stated by one of the witnesses that it did. No contest was made on that ground. Now, then, were these men tradesmen or merchants? It appears that as to their business, outside of their connection with this corporation, they owned a farm in St. Charles county, and carried on business in connection with that farm, sustained heavy losses, and it also appears that they were in the habit of borrowing money. It seems when they failed they owed between $200,000 and $300,000, mostly evidenced by promissory notes, and some certificates of deposit; but it did not appear that they carried on any business of merchandising, or held themselves out to the community in that capacity; and the authorities that were read here on the argument show to my mind, quite conclusively that, having imported this word "tradesman" from the English bankrupt act, it means (and has been so well stated by Judge Lowell of Massachusetts, *In re* Cote, *supra*), that the word "tradesman," as here used in the bankrupt act, has a very limited signification. It says that "if any merchant or tradesman fails to keep proper books of account." Now, the English authorities hold that a man who owned land, or a man who rented land and has held it for a term of years, and carried on the business of brick-making as a means of realizing the profits to be derived from his land, is not a "tradesman," and they have said that the word "tradesman," as used in the bankrupt act, refers to smaller merchants, or tradesmen, or a shop-keeper. And this was the meaning put upon it by the decision of Judge Lowell; it means a smaller class of merchants.

I think that, in the present condition of the law, it is very clear that Merrick & Stickney, so far as shown by this record, were not tradesmen.

For this reason I will reverse the decision of the district court, and order a discharge.

FIRE INSURANCE.

SOSSAMON v. THE PAMLICO INSURANCE CO.

Supreme Court of North Carolina, January Term, 1878.

HON. W. N. H. SMITH, Chief Justice.
" EDWIN G. READE, }
" W. B. RODMAN, } Associate Justices.
" W. P. BYNUM, }
" W. T. FAIRCLOTH, }

WHERE there is a provision in a policy of insurance against fire: "Where the property herein insured, or any part thereof shall be alienated, *or in case of any transfer or change of title to the same or any part thereof or any interest therein* without the consent of the company indorsed hereon, etc., etc., this policy shall cease to be binding on the company," and the insured mortgaged the property without the consent of the company indorsed on the policy, he can not recover in case of loss. The condition is neither unreasonable nor unjust in a policy of insurance, and there is no reason why it shall not be enforced like the terms of any other contract.

This was a civil action brought to recover the amount of a policy, to-wit: $2,500, effected on a stock of goods, and was tried before his Honor, Judge Cloud, and a jury at the Fall Term, 1877, of the Superior Court of Iredell County. The defense was that the plaintiff had forfeited his right to demand any portion of the policy by reason of having mortgaged said goods, etc. His Honor being of opinion with the defendants, the plaintiff submitted to a non-suit and appealed. The facts are sufficiently set forth in the opinion of the Court.

R. F. Armfield, for plaintiff; *Shipp & Bailey*, for defendant.

RODMAN, J., delivered the opinion of the court:

The plaintiff insured with the defendant a certain stock of goods, which he then had in a certain storehouse in Iredell County, against damage by fire, from noon, on the 20th of November, 1875, to noon on the same day, 1876. On the 10th of November, 1876, the stock of goods was totally destroyed by fire. The policy of insurance contained, among other terms and conditions, the following: "V. When property (insured by this policy), or any part there-

of, shall be alienated, or in case of any transfer or change of title to the property insured, or any part thereof, or of any interest therein, without the consent of the company indorsed thereon, or if the property hereby insured shall be levied upon, or taken into possession or custody on any legal process, or the title to or possession be disputed in any proceeding at law or in equity, this policy shall cease to be binding upon the company."

On the 17th of May, 1876, Sossamon & Co., being indebted to Cohen and Rosler in the sum of $881.95, mortgaged the goods aforesaid, and also a certain piece of land and other personal property to Cohen and Rosler, with power to sell the property if the debt was not paid by the first of October, 1876, on giving twenty days' notice of the sale. This mortgage was duly registered. The judge was of opinion, upon these facts, that the plaintiff could not recover, and he thereupon submitted to a non-suit and appealed. To cite and to analyze the numerous cases to which we were referred on the argument, would be a labor without useful result. They may be found collected in May on Insurance and in the briefs of counsel. They generally turn on the language of the condition, under which a forfeiture of the policy is claimed to have been incurred. It has been held that, under a condition against alienation, no forfeiture is incurred by mortgaging the property. At least not until foreclosure, although the right to redeem has been lost at law and turned into an equity. This is because, in many of the Northern states, a mortgage is not regarded as creating an estate in the mortgaged property, but merely a lien on it. A somewhat different view has been held commonly in this and other states. But we were referred to no case in which it was held that giving a mortgage did not work a forfeiture, where the terms of the condition were as comprehensive as they are in this case. There are two considerations on which, it seems to me, the question of forfeiture may always be fairly and reasonably decided.

1st. Does the making of a mortgage come within the words of the condition, as commonly understood? If it does not, a forced meaning should not be put on the words in favor of the company, while if it does the natural and usual meaning must be allowed to them, notwithstanding the conditions are in fine print, if it be legible.

If, in deference to what seems to be the weight of decisions, we admit that a mortgage is not an alienation, even after a forfeiture of the legal estate by non-payment of the debt at maturity, yet it must be considered, under such circumstances, as making a material change in the interest of the insured in the property—at least as much as a levy upon and seizure of the goods under execution, which is specially named as a ground of forfeiture. Both, at law, take the property out of the mortgagor, or defendant in execution, and vest it in another person; while, in substance, both are merely liens, from which the property may be exonerated by payment.

2d. When, as in this case, the making of a mortgage comes within the apparent meaning of the words in the condition of forfeiture, it is proper, then, to consider whether there is anything in the nature of the contract, or in the purposes for which it was entered into, to contract the apparent meaning and restrict the words used. A reason why the company might intend to, and might prudently require that any diminution of the interest of the insured in the property should work a forfeiture, unless consented to by it, is obvious. No company will generally insure property for its full value. To insure it for more than its value is justly regarded as hazardous, and an inducement to fraud. A company looks to the amount of interest in property which the insured has at risk as a principal reason for expecting from him care and watchfulness to protect it from loss. Every diminution of the interest of the insured tends to diminish the watchfulness which is impliedly stipulated for, and when that interest is substantially wholly parted with in any manner, it is equivalent to an absolute alienation, which is admitted to be a ground of forfeiture. In many cases, a mortgage on property to its value, or for even less, is substantially an alienation, for although after a loss of the property the debt, or the residue of it, would continue owing, yet the insured might little regard his mere personal liability. At all events, it is neither unreasonable nor unjust to introduce in a policy such a condition of forfeiture. There is nothing in it to lead to a suspicion of fraud or deception on the insured, and having deliberately and knowingly entered into it, there is no more reason why it should not be enforced against him than the terms of any other contract would be.

Judgment below affirmed.

HUSBAND AND WIFE—HOMESTEAD.

WELLS v. CAYWOOD.

Supreme Court of Colorado, March, 1878,

HON. HENRY C. THATCHER, Chief Justice.
" SAMUEL H. ELBERT, } Associate Justices.
" WILBUR F. STONE, }

1. HUSBAND AND WIFE.—Under the laws of Colorado, the wife is so far relieved from the disability of coverture, as existing at common law, that she is no longer *sub potestate viri*, in respect to real or personal property, and is as capable of the independent acquisition, enjoyment and disposal of the same as if the coverture did not exist.

2. THE LAWS AFFECTING THIS being in the nature of enabling statutes, must be liberally construed to effect the purpose of their enactment.

3. WHERE A DEED OF TRUST is executed to secure a note given to the wife, and the husband is made the trustee in the deed, he can, at a sale under such deed of trust, convey to the wife as fully as to any other person.

4. EJECTMENT—EVIDENCE.— In ejectment it does not devolve upon the plaintiff relying on a deed made by a trustee at a sale under the trust deed, to show that the trustee complied with the conditions prescribed in the deed of trust. The legal estate passes by the trustee's deed—any defects in the execution of

the trust are a subject of inquiry for a court of equity.

5. ILLEGALITY IN CONSIDERATION NO DEFENSE.— The plaintiff having made out his case by showing a complete legal title, the defendant can not defeat a recovery by showing that the consideration recited in the deed was either wanting, or was illegal, or fraudulent. The title having passed, the deed can not be avoided by showing the illegal consideration.

6. IF THE OBJECTION TO A DEED by which plaintiff claims title goes not to the consideration, but to the execution of the deed, it would be a good legal defense, admissible in ejectment under the plea of the general issue.

7. HOMESTEAD — HOW ACQUIRED. — The right of homestead is acquired by writing upon the margin of the record of the deed conveying the land to the claimant the word "Homestead." Until that is done, no right of homestead exists. Marking the word "Homestead" on the record after given a deed of trust, although at the time of giving it the grantor was married, a householder, the head of a family and residing on the premises, and was not joined by his wife in the deed, does not invalidate, affect, or avoid the deed of trust.

APPEAL from the District Court of Boulder County:

The action was begun in July, 1876. The declaration was under the statute in the name of the real parties, and with the usual statutory averments of title in fee, possession, entry by defendant and unlawful withholding. Plea, general issue, under the statute, which enacts that, in ejectment, "the defendant shall plead the general issue only, which shall be that the defendant is not guilty of unlawfully withholding the premises claimed by the plaintiff, as alleged in the declaration; * * * and upon such plea the defendant may give the same matter in evidence, and the same pleadings shall be had as upon the plea of not guilty in the present action of ejectment, except as by the statute otherwise provided; the defendant may likewise give in evidence any matter which, if pleaded in the present writ of right, would bar the action of the plaintiff." R. S. 1868, pp. 274 and 275.

The *present* action of ejectment, and *present* writ of right, refer to those actions as at common law.

By stipulations filed in the case, it appears that one Albert W. Benson was the common source of title; that on the 10th of August, 1873, he was the owner in fee of the premises, residing on them with his wife and family as his home; that he and his wife and family continued to reside on them until June 4th, 1875, when they removed from there and have not resided on them since; that while he was residing on them with his family, to wit: on February 4th, 1875 (long after the deed of trust hereafter referred to was given), Benson wrote on the margin of his recorded title to the premises the word "Homestead."

At the trial, objection was made to the sufficiency of the proof of advertisement of the trustee, on the ground that the files of the paper were the best evidence of that fact. When plaintiff rested, the defendant moved for a non-suit for failure of proof. The motion was overruled. The deed of trust of August 11th from Benson to Caywood was signed by Benson alone. The verdict and judgment in the lower court were for plaintiff, Caywood, whereupon Wells appealed.

"Dower and the tenancy by the curtesy are abolished, and neither husband nor wife have any share in the estate of the other, save as by the statute provided." Rev. Stats. Col. 1868, p. 259. "Every householder, being the head of a family, shall be entitled to a homestead." "To entitle any person to the benefits of the Homestead Act, he must cause the word 'homestead' to be entered of record in the margin of his recorded title to the same, and such homestead shall only be exempt while occupied as such by the owner thereof, or his or her family." By section 6 of the Homestead Act, it is provided that "nothing in said act shall be construed to prevent the owner and occupier of any homestead from voluntarily mortgaging the same, provided no such mortgage shall be binding against the wife of any married man who may be occupying the premises with him, unless she sign and acknowledge the same." R. S. 1868, p. 385. "Any married woman may make a will, but she shall not bequeath away from her husband more than one-half of her property, both personal and real, without his consent in writing." "And in case any married man shall deprive his wife of over one-half his property by will, it shall be optional with such married woman, after the death of her husband, to accept the conditions of said will, or one-half of his whole estate, both real and personal." R. S. 1868, p. 455. The other facts and local statutes applicable are sufficiently set out in the opinion of the court

Wells & Carr, for appellant, cited: 1 Sharswood's Black. 442; Voorhies v. Pres. Church, 17 Barb. 103; Fowler v. Trebein, 16 Ohio St. 493; Abbott v. Hunt, 7 Blackf. 510; Martin v. Martin, 1 Main, 394; Frizzell v. Rozier, 19 Mo. 448; Graham v. Van Wyck, 14 Barb. 531; Winans v. Peebles, 31 Barb. 371; White v. Wagner, 32 Barb. 250; Ib., 25 N. Y. 328. On the rights and disabilities of coverture. Collins v. Blanturn, 1 Smith Lead. Cases, 164; Hoyt v. Macon, 2 Col. 502; Nellis v. Clark, 4 Hill. 426; Gay v. Hook, 4 Coms. 455; Rev. Stat. U. S., § 2290; 16 Texas, 344; 9 Texas, 426; 19 N. H. 196; 22 Miss. 18. Clark v. Underwood, 17 Barb. 202; Tyler v. Yates, 3 Barb. 228, on the illegality and moral turpitude of the consideration for the deed, and the right to show it to defeat a recovery in ejectment. On the homestead claim they cited: Haskins v. Litchfield, 31 Ill. 137; Conner v. Nichols, Ib. 148; Thornton v. Dryden, Ib. 200, and deny the authority of Drake v. Root, 2 Col. 685, arguing that the point before the court in that case was the insufficiency of the verdict of the jury in form, and that the remainder of the opinion was a mere *obitur dictum*, and not good law, relying for this view on the statute (R. S. 385), and Rupert v. Mark, 15 Ill. 540; Pitman v. Gaty, 5 Gil. 186; McConnell v. Reed, 4 Scam. 117; Phelps v. Root, 9 Wis. 70; Spencer v. Fredenhall, 15 Wis. 666; Barker v. Duton, 28 Wis. 367; Campbell v. Babcock, 27 Wis. 512; Hoskins v. Litchfield, *supra*.

Geo. D. Reynolds, for appellees, cited: Laws of

Colorado, 1874, p. 185, (see Revision of 1876, page 615), in support of the proposition that the disabilities of coverture are entirely abolished. In ejectment the action is not on the deed; only those things which go to impeach its execution can be proven; the deed can not be attacked collaterally for matters outside of the deed, and that the defendant is estopped from proving or pleading his own infamy to defeat his own deed. 2 Greenl. Ev., (Red. Ed.). sec. 300, p. 282; Collins v. Blantern, as reported in 6th Am. Ed. of Smith's Lead. Cases, Vol. I, part 1, secs. 490, 495, 497 and 499. Also, notes to same case, pp. 629, 636, 637; Merryweather v. Nixon, 2 Smith Lead. Cases, 6th Am. Ed., p. 530, sec. 459; Inhabitants Worcester v. Eaton, 11 Mass. 368; 2 Greenl. Cruise Dig., p. 497, sec. 26; 1 Litt. (Ky.) 62, Thomas v. Thomas; Hovey v. Hobson, 51 Maine, 62; Doe d. Roberts v. Roberts, 2 B. & Ald. 367; Dyer v. Day *et al.*, 61 Ill. 336; Doe v. Roll, 7 Ohio, 70; Bayard v. Colefax, 4 Wash. Circt. Ct. 38; Greer *et al.* v. Mezees *et al.*, 24 How. (U. S.) 268; Hickey's lessee v. Stewart, 3 How. (U. S.) 750; Broom's Legal Maxims, secs. 571 and 569. For the interpretation of the homestead law, he relied on Drake v. Root, 2 Col. 685.

THATCHER, C. J., delivered the opinion of the court:

This was an action of ejectment brought by the appellee against appellant in the court below. On the eleventh day of August A. D. 1873, Albert W. Benson being at that time the owner in fee of the premises in dispute, made a promissory note for the sum of $250.00 payable to Catherine D. Caywood, the wife of William W. Caywood, two years after the date thereof. On the same day, to secure the payment of this note, Mr. Benson conveyed to Wm. W. Caywood, as trustee, the disputed premises, with power to sell and dispose of the same at public auction in the manner prescribed in said deed of trust, in case the grantor therein should make default in the payment of the promissory note, or any part thereof, or the interest thereon, and to make, execute and deliver to the purchaser at such sale a good and sufficient deed of conveyance for the premises sold. After the maturity of the note, Mr. Benson having made default in its payment, the trustee advertised and sold and conveyed the premises to Mrs. Caywood, the then holder of the note. The deed of trust and the note were offered and read in evidence without objection. To the admission of the trustee deed from Mr. to Mrs. Caywood, counsel for the defendant in the lower court objected on the sole ground that it was a deed executed by a husband to his wife. This objection was overruled, the deed admitted in evidence and an exception taken. The admission of the deed in evidence is assigned for error.

This brings us to the consideration of the question as to the relation of husband and wife under the laws of this state with respect to the independent acquisition, enjoyment and disposition of property. The general tendency of legislation in this country has been to make husband and wife equal in all respects in the eye of the law, to secure to each untrammeled by the other the full and free enjoyment of his or her proprietary rights, and to confer on each the absolute dominion over the property owned by them respectively. The legislation of our own state upon this subject, although yet somewhat crude and imperfect, has doubtless been animated by a growing sense of the unjustly subordinate position assigned to married women by the common law whose asperities are gradually softening and yielding to the demands of this enlightened and progressive age. The benignant principles of the civil law are being slowly but surely grafted into our system of jurisprudence. "In the civil law," says Sir William Blackstone, Com. (Cooley) 444 "husband and wife are considered as two distinct persons, and may have separate estates, contracts, debts and injuries; and therefore in our ecclesiastical courts, a woman may sue and be sued without her husband."

The courts which have ever been conservative and which have always been inclined to check with an unsparing hand any attempted departure from the principles of the body of our law which were borrowed from England, in the states which were the first to pass enactments for the enlargement of the rights of married women, regarding such enactments as a violent innovation upon the common law, construed them in a spirit so narrow and illiberal as to almost entirely defeat the intention of the law makers: but generally with a promptness that left little room for doubt that a succeeding legislature would reassert in a more unequivocal form the same principles which the courts had before almost expounded out of existence. To understand the marked changes which our own legislation has wrought in this respect, it is necessary that we should consider the disabling incidents and burdens attendant upon coverture at common law. At common law the husband and wife are one person, and as to every contract there must be two parties, it followed that they could enter into no contract with each other. The very being or legal existence of the wife is suspended during the marriage or at least is incorporated and consolidated in that of the husband, under whose wing, protection and cover she performs everything. Upon the principle of a union of person in husband and wife depend almost all the legal rights, duties and disabilities that either of them acquire by marriage. 1 Cooley's Blackstone 442. All the personal estate, as money, goods, chattels, household furniture etc., that were the property and in possession of the wife at the time of the marriage are actually vested in the husband, so that of these he might make any disposition in his lifetime, without her consent, or might by will devise them, and they would without any such disposition go to the executors or administrators of the husband, and not to the wife, though she survive him. Debts due to the wife are so far vested in the husband that he may by suit reduce them to possession. 2 Bacon's Abrdgt. 21. The rents and profits of her land during coverture belong to the husband.

The law wrested from the wife both her personal estate and the profits of her realty, however much it might be against her will, and made them

liable for his debts. An improvident husband had it in his power to impoverish the wife by dissipating her personal estate and the profits of her realty over which she, under the law, by reason of the coverture, had no control.

The wife in Colorado is the wife under our statutes, and not the wife at common law, and by our statutes must her rights be determined; the common law affecting her rights, as we shall presently see, having been swept away. By our law, it was declared that the property, real and personal, which any woman may own at the time of her marriage, and the rents, issues, profits and proceeds thereof, and any real, personal or mixed property that shall come to her by descent, devise or bequest, or be the gift of any person except her husband, shall remain her sole and separate property, notwithstanding her marriage, and not be subject to the disposal of her husband or liable for his debts. R. S. 1868, p. 454. The legislature, however, being reluctant to allow a married woman the absolute dominion over her own real property, further provided that she could only convey her estate in lands by uniting with her husband in any conveyance thereof, and acknowledging the same separate and apart from her husband. R. S. 1868, p. 111, sec. 17.

It was not to be expected that our laws would long be permitted to remain in this anomalous and incongruous condition—declaring in one section that the wife's real property should remain her separate estate, not subject to disposal by her husband, and in another that she could not convey it without the consent of her husband, which is necessarily implied by his uniting in a deed with her. By "an act concerning married women," approved February 12th, 1874 (see Revision of 1876, p. 615), it is provided in section 1, that any woman, while married, may bargain, sell and convey *real* and personal property, and enter into any contract in reference to the same, as if she were *sole*. Section two provides that she may sue and be sued in all matters the same as if she were *sole*. Section three provides that she may contract debts in her own name and upon her own credit, and execute promissory notes, bonds, bills of exchange, and other instruments in writing and *may enter into any contract* as if she were *sole*. Section four repeals section seventeen of chapter seventeen of the Revised Statutes, which required the husband to unite with the wife in conveying her separate estate.

This is essentially an enabling statute, and as such must be liberally construed to effectuate the purpose of its enactment. It confers, in terms enlarged, rights and powers upon married women. In contemplation of this statute, whatever may be the actual fact, a *feme covert* is no longer *sub potestate viri*, in respect to the acquisition, enjoyment and disposition of real and personal property.

This statute asserts her individuality, and emancipates her in the respects within its purview from the condition of thraldom, in which she was placed by the common law. The legal, theoretical unity of husband and wife is severed so far as is necessary to carry out the declared will of the law-making power. With her own property, she, as any other individual who is *sui juris*, can do what she will, without reference to any restraints or disabilities of coverture. Whatever incidents, privileges and profits attach to the dominion of property, when exercised by others, attach to it in her hands. Before this statute, her right to convey was not untrammeled, but now it is absolute, without any qualification or limitation, as to who shall be the grantee. Husband and wife are made strangers to each other's estates. There are no words in the act that prohibit her from making a conveyance directly to her husband, and it is not within the province of the court to supply them. When a right is conferred on an individual the court can not, without transcending its legitimate functions, hamper its exercise by imposing limitations and restrictions not found in the act conferring it. Were we to construe this enabling statute so as to deprive the wife of the right to elect to whom she will convey her property, we would, it is believed, thwart the legislative will, whose wisdom we, as a court, are not permitted to question. The disability of husband and wife to contract with and convey to each other, was at common law correlated and founded mainly upon the same principle, viz.: the unity of *baron* and *feme*. The removal, in respect to the wife, of a disability that is mutual and springing from the same source, removes it also as to the husband. The reason, which is the spirit and soul of the law, can not apply to the husband, as it no longer applies to the wife. If she may convey to the husband the husband may convey to the wife. Allen v. Hooper, 50 Maine 371; Stone v. Gazzonn, 46 Alabama 269; Burdens v. Ampesse, 14 Mich. 91; Patten v. Patten, 75 Ill. 443.

Perhaps the right of the husband, when acting in a representative capacity *in autre droit* to make a deed to his wife might be supported at common law. Co. Litt., 112 a. 187 b; Com. Digest, Barron &. Feme D. 1. This doctrine, however, is repudiated in New York (Leitch v. Wells, 48 Barbour 654), but sanctioned in Pennsylvania (Dundas's Appeal, 64 Penn. 332). We, however, rest our decision, not upon this mooted doctrine, but broadly upon the statute, under which a husband, when acting, not in a representative capacity, but in his own right, has, as we have seen, the right to convey directly to the wife. But it may be urged that if not by reason of the disability of coverture, then by reason of the peculiarly intimate relation of husband and wife, and the consequent opportunity to commit and conceal fraud, the same principle that prohibits a trustee from executing a trust in favor of himself, also prohibits him from executing it in favor of his wife. This position is not without force. Dundas's Appeal, 64 Penn. 332. It must, however, be borne in mind that it is only in the absence of an express agreement that the law, suspicious of fraud and collusion where a fiduciary relation exists, will not permit a trustee to become either directly or indirectly a purchaser at his own sale; but where the right to purchase is conferred in clear terms by the instrument appointing him, or where, as in the case before us, the wife, as the

holder of the note, is, in unmistakable language, authorized to buy at the trustee's sale, the law interposes no impediment to the validity of a sale so made. Perry on Trusts, Sec 602 ; Dundas's Appeal, cited *supra*, is precisely in point.

The evidence of Eugene Wilder, one of the proprietors and publishers of the Boulder County *News*, (which was received without objection) sufficiently proves the due publication of the trustee's notice of sale, if the proof of that fact was necessary to entitle the plaintiff to offer her deed in evidence.

In our view, in order to entitle a purchaser at a trustee's sale to maintain ejectment, it does not devolve upon him to show that his grantor (the trustee) had complied with the conditions prescribed in the deed of trust. Reese v. Allen, 5 Gilman, 241; Graham v. Anderson, 42 Ill. 515; Taylor v. King, 6 Munf. (Va.) 358; Harris v. Harris 6 Munf. 367.

In Dawson v. Hayden, 67 Ill. 52, it was held if a trustee, under a power in a deed of trust, makes a conveyance of the premises, without complying with the provision in the deed of trust, requiring publication of sale for a specified period, the legal estate will nevertheless pass to the purchaser, and the deed to him can not be impeached on that ground by a defendant in ejectment. It is a proper subject of inquiry in a court of equity.

A legal though defeasible title was by the trust deed vested in Mr. Caywood. Perry on Trusts, Sec. 602, and cases cited. By the deed executed by Mr. Caywood to his wife, although inartificially drawn, the legal title passed to the purchaser and became absolute in a court of law. That it should so pass was the evident intent of the grantor therein. The deed purports on its face to have been made for the sole purpose of executing the trust. To give it any other construction would be to defeat the manifest purpose of its execution.

As when the plaintiff rested she had shown by her deeds that the legal title to the premises in dispute was in her, the motion for a non-suit was properly denied. The defendant offered in evidence the deposition of A. W. Benson, which the court excluded. The exclusion of the deposition is assigned for error. The deposition tended to show that the note and trust deed offered in evidence were executed in pursuance of an agreement between Benson and William W. Caywood, by which Benson was to enter under the pre-emption laws of the United States, a certain tract of land, and convey the same to Mr. Caywood. Had Benson, in pursuance of the agreement, entered and conveyed the land to Caywood, he would have been guilty of great moral turpitude, involving the crime of purjury. The consideration was therefore illegal. Hoyt v. Macon, 2 Col. 502.

Can a defendant in ejectment show that the consideration for a deed, under which the plaintiff claims title, was either wanting or was illegal or fraudulent? That a conspiracy existed to defraud the United States out of the title to one hundred and sixty acres of land the deposition tends to show. Nothing appears to relieve the consideration from the taint of illegality and fraud. The question here presented was very fully considered in the case of The Inhabitants of Worcester v. William Eaton, 11 Mass. 368, in a writ of entry in which the plaintiff sought to avoid the deed under which defendant claimed title by showing that it was executed for an illegal consideration. The consideration was an agreement to compound a felony. The court says: "A bond or other obligation, or a written promise, founded upon such a consideration, may be avoided: because the law will not uphold a contract or permit a party to enforce it, if it was made to secure the price of an unlawful act. * * * If one holds the obligation or promise of the other, to pay him money, or do any other valuable act, on account of such illegal transaction, the party defendant may expose the nature of the transaction to the court, and the law will say: 'Our forms and rules are established to protect the innocent and to vindicate the injured, not to aid offenders in the execution of their unjust projects,' and if the party who has foolishly paid his money repents his folly, and brings his action to recover it back, the same law will say to him: "You have paid the price of your wickedness, and you must not have the aid of law to rid you of an inconvenience which is a suitable punishment of your offense.' * * * * A deed of bargain and sale, signed, sealed, delivered, acknowledged and recorded, is an *actual* transfer of the land to the grantee, as much as the delivery over of a sum of money or a personal chattel."

The court held that, the title having passed, the deed could not be avoided by showing the illegal consideration. It is not doubted that if the defense had gone, not to the consideration, but to the *execution* of the deed, it would have been admissible. Thus it might be shown that the deed was executed under duress, or that it had been misread to the grantor, or other evidence might be given tending to prove that he did not assent to it. But want of, or fraud in, or illegality of the consideration in a plaintiff's deed, may not be shown by a defendant in ejectment. The defendant's remedy, if any he has, is not in a court of law. Doe dem. Roberts v. Roberts, 2 Barn. & Ald 367; Taylor v. King, 6 Munf. (Va.) 365; Dyer v. Day, 61 Ill. 336; Hovey v. Hobson, 51 Maine 67. The deposition of Benson was properly excluded.

Defendant then offered to introduce in evidence, a warranty deed, dated June 3d, 1875, from Alfred W. Benson, and Helen Benson, his wife, purporting to convey the premises in dispute to him, and containing a waiver of homestead exemption in the body of the deed. By the stipulation filed in the cause, it appears that Benson, on the 4th day of February, 1875, a year and a half after the execution of the trust deed to Caywood, caused the word " homestead " to be entered of record on the margin of his recorded title. The law requires such entry to be made to entitle a householder to a homestead. R. S., 385. It is the record entry that proclaims to the world that the owner of the property claims it as a homestead. Until the entry is made it is not in contemplation of law a homestead, and therefore it can not be said that as the wife of Benson did not join with him in the

execution of the trust deed, as is required by the homestead act (R. S., 1868, p. 386) in case of mortgages executed after the property is claimed as a homestead, that the trust deed was executed against the provisions of law. Having reference to the condition of the property, at the time the trust deed was made, Benson alone was a necessary grantor, even if a trust deed is to be considered as a mortgage within the meaning of that word as used in the homestead act. Drake v. Root. 2 Col. 689.

The subterfuge adopted by making the entry of "homestead" on the record on the very day that Benson and family vacated the premises, can not be held to invalidate the trust deed. The deed from Benson and wife to the defendant in ejectment was subject to the encumbrance contained in the deed of trust, and must yield to any title *legally* deduced under it. Taylor v. King, cited *supra*.

Wells having purchased with the record notice of the trust deed, occupies no better position than his grantor. The source of title in both appellant and appellee is the same. The court did not err in excluding the deed from Benson and wife to Wells. As we discover no error in the record, the judgment of the court below must be affirmed.

JUDGMENT AFFIRMED.

THE BANKRUPT LAW—ITS PROVISIONS AND OBJECTS—SHOULD THE LAW BE REPEALED.

Prior to the bankruptcy law of 1867, there had existed in the United States two similar laws. One became a law and went into practical operation April 4, 1800; the other on the 19th day of August, 1841; the former was repealed in less than three, and the latter in less than two years from the date of their passage. The former law seems to have largely favored the creditor, while the latter law went to the opposite extreme, and favored the debtor.

Although the words *bankrupt* and *insolvent* are now used in this country almost as convertible terms or as being equivalent to each other, under the law of 1800, the word bankrupt seems to have been used and understood in quite the technical sense it bore under the English law. The word bankrupt occurs for the first time in the title of the statute 34 and 35, Henry VIII, ch. 4, "against such persons as do make *bank rupt* "—a literal translation of the French idiom *qui font banque route*.

The broad distinction between a bankrupt law and an ordinary law is: The summary and immediate seizure of all the debtor's property; the distribution of it *pro rata* among the creditors in general; the discharge of the debtor from future liability for debts then existing.

It is evident, from the speeches made and proceedings taken, that the bankruptcy law of 1867 was passed with the view and intention of throwing off the commercial gyves from myriads of unfortunate debtors, and to open to the honest insolvent or bankrupt the door of freedom from his debts, and to give him a new lease of business life.

It was supposed and intended that, under this bankrupt law, the debtor and the creditor class would unite on the common ground of obligation and duty. But whether or not the practical operation of the law has yielded that protection to the creditor, or even to the debtor class, as was at first anticipated it would do, or whether the measure was fraught with beneficence to all, may be reasonably questioned. It will not, we think, be reckoned harsh to apply to our bankrupt law the terms which are generally applied against the German law based upon a similar system—"that it has been, and is, subject to much delay, expense, fraud and abuse."

By section thirty-nine of the bankrupt law, as amended by the supplementary act of 1874, it is declared what shall be deemed acts of bankruptcy, among which are: Departing from the state, or remaining absent therefrom, with intent to defraud creditors, or concealing or removing his property to avoid its sequestration; or making any assignment, gift, sale, conveyance, or transfer of his estate or property, with intent to delay, defraud or hinder his creditors; or disposing of any property, rights or credits, with the intent to give a preference; or who, being a bank, banker, broker, merchant, trader, manufacturer or miner has fraudulently stopped payment and not resumed payment, within forty days, of his commercial paper, (made or passed in the course of his business as such), or who, being a bank or banker, shall fail for forty days to pay any depositor upon demand of payment lawfully made, shall be deemed to have committed an act of bankruptcy, and shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth thereof in number, and at least one-third in amount of the debts provable under the law. Creditors whose respective debts do not exceed two hundred and fifty dollars in amount shall not be reckoned in such number. If the provable debts exceed the said sum, and constitute one fourth in number of the creditors holding provable debts exceeding said sum, the requirement as to the number of petitioning creditors is held to be satisfied *In re* Hymes, 10 N. B. R. 433, Blatchford, J. Those debts only are to be counted which are not secured by liens and the like. *In re* Frost, 7 Chic. L. N. 42, Blodgett, J. The debtor is entitled to have a copy of the petition served upon him personally or left at his usual place of abode. Service may, in certain cases, under direction of the court, be made by publication. On the return-day the court may hear the allegations of the petitioner and the answer of the debter, or may adjourn the proceedings for good cause shown for that purpose to a future day. Section 41 as amended: The court may, at the request of the debtor, award a *venire facias* to the marshals, returnable within ten days thereafter, for the purpose of having the allegations set out in the petition tried. All proceedings in bankruptcy may be discontinued on reasonable notice and hearing, with the approval of the court. As amended by section 14, act of June 22, 1874: That if the facts set forth in the petition are proved to be true, or if default be made by the debtor, the

court may adjudge the debtor to be a bankrupt, and a warrant may issue and the property of the debtor be taken thereunder. If the debtor fails to appear in the proceedings, a certified copy of the adjudication shall forthwith be served on him, as provided for in the service of the order to show cause.

In case of an abandonment of the bankruptcy proceeding by the creditor as well as by the debtor, it is held that any other creditor may intervene, and upon proper application may proceed to an adjudication. *In re* Lacey, 10 N. B. R. 488, Woodruff, J. And such intervention may be made at any time to which the matter has been adjourned for the purpose of showing cause.

As to Composition with Creditors.—Under section forty-three, as amended June 22d, 1874, § 17, the provisions of which seem to have been based upon §126 of the English bankrupt law of 1869, 32 and 33 Victoria, Ch. 71, it is declared, that the creditors of a bankrupt may, upon ten days' notice of the time, place and purpose of the meeting, resolve that a composition proposed by the debtor be accepted, in satisfaction of his debts. Such resolution must be passed by a majority in number and three-fourths in value of the creditors assembled at such meeting, which provision is held to be mandatory (*In re* Spades, 13 N. B. R. 72), and must be confirmed by the signature thereto of the debtor and two-thirds in number and one-half in value of all the creditors of the debtor. The confirmation need not be presented to the register. *Re* Spillman, 13 N. B. R. 214. Those whose debts amount to sums exceeding fifty dollars may be reckoned in the majority in value, but not in the majority in numbers to pass and confirm the report. *Re* Spades, 13 N. B. R. 72; *Re* Wald, 12 Id. 491. The resolution, as passed and confirmed (*Re* McDowell, 6 Biss. 193, 15 N. B. R. 73), shall be presented to the court, and if found to have been passed in accordance with the law, it may direct and cause the resolution to be recorded. The terms of the composition may be subsequently varied in the same manner as the original resolution was passed, without any prejudice to any persons taking interest under such provisions who do not assent to such addition or variation. It has been held that the decision of the majority of the creditors is conclusive as to the amount of the compromise being for the best interests of all parties. *Re* Morris, 11 N. B. R. 443. Such proceedings shall be binding upon all creditors whose names, addresses and the amounts of the debts due to whom, are shown in the statement of the debtor produced at the meeting at which the resolution was passed. Compositions made in pursuance of the bankrupt law may be enforced by the court, and the same may likewise be set aside in consequence of legal difficulties, or for any sufficient cause shown. *Re* Weber F. Co., 13 N. B. R. 529; *Re* Whipple, 11 Id. 524. The proceedings for composition may be taken whether an adjudication has been had or not, and this feature of the law has been affirmed as constitutional. In the matter of Reiman, 13 N. B. R. 128.

The composition is held not to be vitiated by a mistake on the part of the debtor as to his assets, or as to the amount due to creditors; but if incorrectly stated, may be corrected at a meeting of the creditors. *Re* Asten, 14 N. B. R. 7; *Re* Morris, 11 Id. 443; *Re* Trafton, 14 Id. 507; *Re* Reiman, 13 Id. 128.

Much difficulty has, at times, been experienced upon the question as to whether payment under a composition, in indorsed notes, was valid under the law; and by several well considered cases, *Re* Hurst, 13 N. B. R. 255, *Re* Reiman, 11 Id. 21, it has been held that such payments are valid, but that the debtor is not entitled to his discharge unless the amount agreed upon is actually paid. It has also been conclusively held that a resolution of compromise does not affect an attaching creditor, whose attachment is less than four months old, unless an assignee has been elected and an assignment been made of the bankrupt's effects. *Re* Clapp, 14 N. B. R. 191; *Re* Shields, 15 N. B. R. 532. See an exhaustive opinion on this subject in *Re* Scott, 13 N. B. R. 73. The composition is held to be in itself a discharge (*Re* Becket, 12 N. B. R. 201) of the debtor. And this section of the law applies to copartnerships and corporations. *Re* Weber Furniture Co., 13 N. B. R. 529; Pool v. McDonald, 15 N. B. R. 560.

Section forty-four, as amended, provides that, if the bankrupt shall, after the commencement of proceedings in bankruptcy, secrete any property belonging to his estate, or part with, destroy, alter, mutilate, or falsify any book or document relating thereto, or cause any of those acts to be done, or removes the same, or any part thereof, out of the district, to prevent the same coming to the assignee, or make any payment, gift, sale or transfer of property belonging to his estate with like intent, or shall spend any part in gaming; or, shall, with intent to defraud, willfully and fraudulently conceal from the assignee or omit from his schedule "any property or effects whatever," or shall attempt to account for any of his property by fictitious losses or expenses; or, within three months before the commencement of proceedings in bankruptcy, under false color and pretense of carrying on business and "dealing in the ordinary course of trade," obtain on credit from any person any goods or chattels with intent to defraud; or shall, within said time, pawn, pledge or dispose of, otherwise than by *bona fide* transactions in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, in any court of the United States, shall be punished by imprisonment with or without hard labor, for a term not exceeding three years. While section forty-four and other provisions of the bankrupt law, would seem to throw around the debtor quite a network of acts, the conviction of either one of which being sufficient to make him answerable to the crime of misdemeanor, it is a notorious fact, that very few cases appear in the reports where a bankrupt has been found guilty of either one of them. Notwithstanding the fact that cases frequently occur where the bankrupt has disposed of goods otherwise than by *bona fide* transactions "in

the ordinary way of his trade," the proof requisite to a conviction in such cases is, that the creditor must show that the goods in question were disposed of within "three months;" and further, the creditor has the *onus* upon him of showing that the goods claimed to have been so sold were the identical goods that remain unpaid for; and such identity must be absolutely proved, nothing being left to inference, in a proceeding of that character. And thus, the creditor being held to strict proof, can in hardly any case obtain a conviction.

While the present bankrupt law is in many respects a great improvement on either of the two former laws, there is evident need of amendment in many particulars before the law will work that beneficence to the commercial interests of the country that the advocates of it at the outset promised and assumed. One general benefit and advantage, however, is vouchsafed by the bankrupt law over all other laws, and that is, it prevents a creditor from gaining an undue advantage by action at law, as, where a debtor finds that he is being sued and judgment is likely to go against him, he may file his petition in bankruptcy and enjoin the creditor from proceeding in his action. Creditors may also unite and put the debtor into bankruptcy for the purpose of effecting a similar result.

It is evident, on all hands, that the merchants and the monied interests of the country take the proper and wise view of the matter in insisting upon either a repeal of the bankrupt law, or that it shall be so amended as to better protect the creditor class.

J. F. B.

SOME RECENT FOREIGN DECISIONS.

RAILWAY COMPANY—LUGGAGE OF PASSENGERS—DELIVERY — CONTRIBUTORY NEGLIGENCE. — *Patscheider v. Great Western R. R.* English High Court, Ex. Div., 26 W. R. 268.—Taking a passenger's luggage out of the van and putting it on the platform, does not constitute a delivery by a railway company to the passenger. The company are bound to give the passenger reasonable time for claiming it and taking it away before their liability ceases.

CONFLICT OF LAWS—ADMINISTRATION—INTEREST—LEX FORI.—*Hamilton v. Dallas.* English High Court, Chy. Div., 26 W. R. 326.—In an administration by the court of the assets in this country of a testator who had a foreign domicil at the time of his death, although the property will be distributed according to the law of the place of domicil, the payment of interest will be governed by the practice of this court.

DISCOVERY AND INSPECTION OF DOCUMENTS—PRIVILEGE—COMMUNICATIONS BETWEEN SOLICITOR AND CLIENT IN A FORMER ACTION.—*Bullock v. Corne.* English High Court, Q. B. Div., 26 W. R. 330.—Communications between solicitor and client, to which privilege once attaches, are always privileged, whether they have been made with reference to the existing action, or to a previous one; *a fortiori* are they privileged when the question in dispute is the same in the second action, as in the former one. So held, where A., having failed in an action brought against him by B., brought an action for indemnity against C., who was under the same obligation to him as he was to B., and the application was by C. to inspect documents to which privilege attached in the former action.

NOTES OF RECENT DECISIONS.

MASTER AND SERVANT—LIABILITY OF CORPORATION TO SERVANT—DEFECTIVE APPLIANCES—NEGLIGENCE—NOTICE.—*Oak Bridge Coal Co. v. Reed.* Supreme Court of Pennsylvania, 5 W. N. 3. Opinion PER CURIAM. 1. A master is not liable to his servant for injuries occasioned by the use of defective appliances furnished by the master, if such defects are so obvious that no prudent man would use the appliances, and the servant gives no notice to the master that such defects exist. But where such appliances, though in fact dangerous, are not obviously defective, and the servant, in the execution of his employment, notwithstanding the exercise of skill and caution in their use, is injured by reason of defects in the appliances, the master will be held liable. 2. The plaintiff was employed by the defendant as a brakeman; his duty required him to couple cars while on a trestle work, and, while so engaged, he was injured by reason of an alleged defect in the construction of this trestle work. The court below submitted to the jury the question of fact as to the defective character of the trestle work, and instructed them that if the plaintiff, in obedience to the requirements of the defendant, incurred the risk of the alleged insufficiency of the trestle work, and it was reasonably probable that the trestle work could be used without danger by the exercise of ordinary care, and the plaintiff did in fact exercise such care, and was, nevertheless, injured by reason of the defect of the trestle, then the defendant was liable. *Held*, not to be error.

ASSAULT WITH INTENT TO MURDER—PRESUMPTION—INDICTMENT—INSTRUCTIONS—CRIMINAL RESPONSIBILITY OF ONE WHO SETS OUT SPRING GUNS. —*Simpson v. State.*—Supreme Court of Alabama. From original opinion of BRICKELL, C. J.—1. Section 3670, of the Revised Code, which punishes assaults, with certain intents, as felonies, was designed for the punishment of several distinct offenses, elements of each being an act done, which, of itself, may be indictable, yet is aggravated by the intent attending it and the higher offense contemplated. 2. Each of these offenses, though not recognized at common law as separate, distinct, technical offenses, was an offense known to the common law, and indictable and punishable as a misdemeanor; and our statute not declaring the constituents of the offenses, resort must be had to the common law to ascertain the facts, which must concur to constitute the felonious assault or attempt. 3. Indictments, under the statute, as at common law, charging one offense, can not be supported by proof of another offense; and as the gist of the offense charged in assault with intent to murder is an assault with intent to murder the person named in the indictment, there can be no conviction of the offense charged if the intent was to murder some other person or to commit some other offense, though there may be of the minor offense of an assault, or an assault and battery. 4. The specific intent to murder the person named in the indictment must be proved as a matter of fact, the jury ascertaining its existence from all the facts and circumstances in the evidence. 5. An act done with a particular specific intent is the offense at which the statute aims; the doctrine of an intent in law different from the intent in fact, has no just application, and if the real intent shown by the evidence is not that charged, there can be no conviction of the aggravated offense charged. 6. Whatever may be said of a charge "that if a man shoots another with a deadly weapon, the law presumes that by such shooting he intended to take the life of the person shot," when

given on a trial for murder, it is manifestly erroneous when given on a trial for an assault with intent to murder; for if it had any force it converts the material element of the offense, the intent to murder a particular person, into a presumption of law drawn from the nature of the weapon, and the act done with it, whereas the intent is a fact to be ascertained by the jury, in view of all the facts and circumstances of the case; the weight to be given to the character of the weapon and the manner of its use being facts to be considered along with the other evidence. 7. The common law rule once prevailing in England, allowing the owner of property to set spring guns to protect it against trespassers, is inconsistent with our customs and institutions, and has never been in force in the state. 8. While the owner may use necessary force to prevent a trespasser from taking property, the rule is subject to the qualification that he must not, except in extreme cases, endanger human life or great bodily harm; and if, in order to prevent a bare trespass, life is taken with a deadly weapon, the killing is murder; while if the weapon used is not a deadly weapon, and is suited rather for alarm or chastisement, and there was no intent to kill, the killing will be manslaughter. 9. The owner can not, because he inflicts injuries by means of spring guns which can not harm the trespasser without his concurring unlawful act, lawfully inflict other or greater harm to the person of the trespasser, to deter or frighten him, then he could, if personally present, directing or doing the shooting himself; and the principle is not different because the tresspasses are repeated, secret and under cover of darkness, by persons unknown to the owner. 10. On the trial of an indictment for an assault with intent to murder, instructions that if death had ensued from the wounding of the prosecutor by spring guns, placed by defendant to protect his own property from trespassers, the killing would have been murder, it follows that the defendant was guilty of an assault with intent to murder, is erroneous. 11. So, also, instructions that the defendant was guilty of an assault with intent to murder, if the spring gun wounding the prosecutor was set with the specific intent to kill him, the defendant suspecting him to be the trespasser and bearing malice against him, although there was also a general intent to kill whoever was the trespasser, are erroneous in such a case. 12. Setting a spring gun on a man's own premises, to prevent or shoot trespassers, is not an assault; and where a person trespassing there is wounded by it, although it was set to kill him, the defendant suspecting him to be the trespasser and having malice toward him, it is not an assault with intent to murder, under the statute. 13. Whether, where a gun is set with intent to kill a particular person who is injured by it, it is not an attempt to commit murder by means not amounting to an assault, indictable under another section of the statute, is a question not presented by this case. Reversed and remanded.

ABSTRACT OF DECISIONS OF THE ST. LOUIS COURT OF APPEALS.

[Filed March 19, 1878.]

HON. EDWARD A. LEWIS, Presiding Justice.
" ROBERT A. BAKEWELL, } Associate Justices.
" CHAS. S. HAYDEN, }

A COVENANT THAT A GRANTOR "shall and will warrant and defend said lot of ground unto the said party of the second part and his heirs and assigns forever, against all persons, claims, liens, titles and encumbrances whatsoever," is a covenant of general warranty, and includes a covenant against encumbrances, and a recovery may be had upon it as on a covenant against encumbrances. Rehearing denied. Opinion by BAKEWELL, J.—*Walker v. Deaver.*

JURY—COURT REFUSING TO RECEIVE VERDICT—MANDAMUS.—1. The court instructed the jury that, under the pleadings and evidence, the plaintiff was not entitled to recover. Plaintiff refused to take a nonsuit; the cause was then submitted to the jury, who found a verdict for the plaintiff for $4,300, in due form; the court refused to receive the verdict, and directed the jury to retire and return a verdict for defendant, which was done, and judgment entered thereupon. *Held*, in a proceeding for a mandamus to compel the trial judge to receive and record the first verdict, that the petition setting forth those facts set forth no sufficient grounds for issuing the writ. 2. The giving of the above instruction was equivalent to sustaining a demurrer to the evidence, and when a demurrer to the evidence is sustained, the jury has nothing to do with the facts; their act in returning a verdict is then merely formal; the judge alone is responsible for the verdict, and the jury are as much bound to render it as they are to obey any other lawful direction of the judge. Demurrer sustained. Opinion by HAYDEN, J.—*State ex rel. Griswold v. Thayer.*

LARCENY—COFFIN—VALUE.—1. A coffin used to cover a corpse may, after burial, be the subject of larceny. 2. The property may be said to be in the person who bought the coffin for the purpose of interment. 3. Articles which have no market value, may, nevertheless, have a value which the law will recognize. It is competent for a jury, in case of larceny of a coffin, to arrive at the value of the coffin at the time it was stolen, from the fact that the coffin was new, and from the price shown to have been paid for the coffin when bought. And, where it was shown that the coffin cost thirty-five dollars, they might well, under the circumstances, find the offense grand larceny, under an instruction that, to so find, they must find the coffin to be worth more than ten dollars. Affirmed. Opinion by HAYDEN, J Per LEWIS, P. J., concurring. —In a buried coffin containing a corpse there is no ownership that can be asserted by one person against another in a civil action; but an ownership of a character sufficient to support a charge of larceny will be taken to exist somewhere. It is not necessary for the purposes of the criminal law to fix this ownership, and an indictment is sufficient which charges that the coffin is the property of some person to the jurors unknown.—*State v. Doepke.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF MISSOURI.

October Term, 1877.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON,
" WARWICK HOUGH,
" E. H. NORTON,
" JOHN W. HENRY, } Associate Justices.

EJECTMENT—EQUITABLE ANSWER—PRACTICE.—Where an answer in ejectment admits the plaintiff's legal title, and sets up facts which constitute an equitable defense, but does not constitute an estoppel or bar to the action, the answer should contain a prayer for an account, and that the amount found to be due defendant be declared a lien on the land, 64 Mo. 518; 58 Mo. 563. Opinion by HOUGH, J.—*Sims et al. v. Gray.*

ENDORSEE AND ENDORSER—PAROL TESTIMONY.—In an action by the endorsee of a promissory note against the endorser, who was payee thereof, verbal testimony is not admissible to show that the payee signed in any capacity, or assumed any liability except that which the law attaches to his signing. 42 Wis. 56; 3 N. H. 132; 29 Barb. 489; 6 Black. 509; 29 Ind. 271; *contra*, 19 Penn. St. 396. Opinion by HOUGH, J.—*Rodney v. Wilson, adm'r.*

RAILROADS—KILLING STOCK.—Under section 43 of the railroad law, there can be no recovery for injuries resulting from negligent management of the train. 60 Mo. 209; 64 Mo. 255. The opinion comments on Lloyd v. P. R. R. Co., 49 Mo. 199; the 5th section of the damage act; Ellis v. P. R. R., 48 Mo. 231; Parks v. St. L. & I. M. R. R., 58 Mo. 45; Carey v. R. R., 60 Mo. 209; Wood v. R. R., 58 Mo.; and the conclusion drawn from all the cases is that under section 43 the action is not based upon negligence; that section 5 of the damage act was designed as an inducement to railroads to fence the track where the law did not *require* it to be done, but where it might be properly fenced; and that the action in this case being for the killing of hogs within the limits of the town of New Cambria, but outside of the part of the town laid off into and crossed by streets and alleys, ought to have been brought under section 5. Opinion by HOUGH, J.—*Edwards v. H. & St. Jo. R. R.; also Eliot v. H. & St. Jo. R. R.*

DEED—DELIVERY.—Delivery is essential to make a deed effective, and must be made actually or constructively during the life-time of the grantor. 12 Wend. 407; 12 Johns.421; and the constructive delivery must be made by some one holding the deed in escrow or as trustee. 2 Mass. 447; Greenl. Ev. Vol. II, § 297; 34 N. H., 460, 476. The test of the delivery of a deed is the fact that the grantor has divested himself of control over it. Where a father made a deed to his son and retained the custody of it himself, keeping it in a chest to which the son had access, and it was the grantor's intention that the son should have it after his own death, there was no delivery. Opinion by HOUGH, J.—*Henry v. Henry.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF ILLINOIS.

October Term, 1877.—*Filed Feb.* 7, 1878.

Hon. JOHN SCHOLFIELD, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" BENJAMIN R. SHELDON,
" PICKNEY H. WALKER,
" JOHN M. SCOTT,
" ALFRED M. CRAIG,
} Chief Justices.

PRACTICE—SUIT FOR DELINQUENT TAXES.—An application for judgment for delinquent taxes is a summary proceeding and governed by the revenue act and the act in relation to trial by jury has no application to such a case, and the refusal of a jury in such a case held not error. Opinion by BREESE, J.—*Mix v. The People.*

EVIDENCE—EXPERT—REAL ESTATE.—In proving the value of property the rule does not confine it to experts, but any person having a knowledge, general or specific, may testify to its worth. Nor can the court determine as to the extent of the witness's knowledge before he can testify, or after having testified, determine what weight his evidence shall receive by excluding it, unless it fails in its tendency to prove the issue. The jury are presumed to be able to determine the weight that should be given to it, and if the means of information are limited, the jury should give his evidence slight if any weight. In proving values some latitude from the very nature of the question must be given as to the person who shall testify. Opinion by WALKER, J.—*The Chicago, Rock Island & Pacific R. R. v. Jones.*

CONTRIBUTION—TENANTS IN COMMON—REMOVAL OF INCUMBRANCE.—A died seized of lands, leaving B, his widow, and C, D and E, his children and heirs at law. In 1874 C sells to D his interest in the lands and he thereby becomes owner of two-thirds, the premises still being subject to the dower and homestead interest of the widow. In September, 1874, D and E filed their petition for partition against their mother as defendant. While the suit was pending D purchased of the widow her dower and homestead interest, paying therefor $1,500. D then dismissed the bill as to B and made E defendant and offering to permit him to share in the benefits of the purchase by contributing her proportion, prayed that if she refused, he be reimbursed one third of the outlay by decree of court. The lower court granted a partition and decreed that E pay to D one-third of the cost of purchasing the dower and homestead. To this E excepted on the grounds that dower and homestead are not such incumbrances on property as one tenant in common may compel a co-tenant to contribute to, and because a person cannot create another his debtor without the consent of the other. *Held*, that if E claims and holds an equality of benefit from the purchase of dower and homestead, she must submit to an equality of burthen, and that in equity the rule as to the making of a person a debtor without his consent, has always had an exception where tentants in common hold property encumbered. Opinion by WALKER, J.—*Wilton v. Tazewell.*

ABSTRACT OF DECISIONS OF SUPREME COURT COMMISSION OF OHIO.

December Term, 1877—*Filed March* 20, 1878.

HON. W. W. JOHNSON, Chief Justice.
" JOSIAH SCOTT,
" D. T. WRIGHT,
" LUTHER DAY,
" T. Q. ASHBURN,
} Associate Justices.

GRAND JURORS—QUALIFICATION—LIQUOR LAWS.—1. That a person has subscribed funds for the purpose of legitimately suppressing crime, does not disqualify him from sitting on the grand jury; nor is it ground of disqualification that he has evinced a desire and purpose to enforce the laws. 2. The fact that township trustees caused one of their number to be returned as grand juror, does not disqualify him from serving as such. 3. In an indictment for selling intoxicating liquors, in violation of law, the time of the alleged offense is immaterial, and proof of a number of sales about the time alleged in the indictment and prior to the finding thereof, is sufficient to warrant conviction. Judgment affirmed. Opinion by WRIGHT, J.—*Koch v. State.*

RAILROADS—NEGLECT OF CONDUCTOR TO EJECT UNRULY PASSENGER.—1. It is not only the right of a conductor to expel from a train a drunken, unruly, boisterous passenger, but when such a person endangers, by his acts, the lives of people, it is the duty of such conductor to remove such passenger in order to protect others from violence and danger. 2. But this right must be reasonably exercised, and not so as to inflict wanton or unnecessary injury upon the offending passenger, nor so as to needlessly place him in circumstances of unusual peril. 3. If having exercised reasonable prudence, considering the time, place and circumstances, as also the condition of the drunken man himself, the conductor expels such passenger, who is afterward run over and killed by another train not in fault, the expulsion itself is not such proximate cause of the death as will make the company liable. Judgment reversed. Opinion by ASHBURN, J. Scott, J., being absent, did not sit.—*Pits., Ft. Wayne & Ch. R. R. v. Valleley.*

MARRIED WOMAN—CONTRACTS.—1. An indebtedness incurred by a married woman, for the benefit of herself or her separate property, and upon its credit, and the giving of a note or other obligation therefor, are facts from which a court of equity may imply and enforce a charge against such property. 2. But an intention to charge such property will not be implied merely from the giving of a note or other obligation

by a married woman. 3. Neither will her separate property be made liable for her general engagements, in the absence of a contract valid in law to bind the same, or of such facts and circumstances as make it, as between the parties, just and equitable. 4. When a married woman subscribes to capital stock of a railroad corporation, by which she agrees to take and pay for a certain number of shares of said stock, but makes default in payment, and an action is brought to charge her separate property with the amount of such subscription: *Held*, that in the absence of any proof that either party dealt on the credit of such property, equity will not imply or enforce a charge against the same. Opinion by JOHNSON, C. J.—*Rice v. T., T. & E. R. R.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF OHIO.

December Term, 1877.—*Filed March* 19, 1878.

Hon. WILLIAM WHITE, Chief Justice.
" W. J. GILMORE,
" GEO. W. MCILVAINE,
" W. W. BOYNTON,
" JOHN W. OKEY,
} Associate Justices.

GIFT OF FUND—CHECK.—The drawer of a check delivered it to the payee, intending thereby to give to the payee the fund on which the check was drawn. *Held*, that until the check was either paid or accepted, the gift was incomplete; and that in the absence of such payment or acceptance, the death of the drawer operated, as against the payee, as a revocation of the check. Opinion by WHITE, C. J.—*Simmons v. Cincinnati Savings Society.*

HOMESTEAD—ABANDONMENT—CONSTRUCTION OF ACT.—An insolvent debtor conveyed all his property, including his family homestead, on which were certain liens which precluded its exemption, to an assignee for the benefit of creditors; afterward the assignee brought an action to marshal liens, and for the sale of the homestead, in which action a sale was ordered for the payment of the preferred liens, reserving however to the debtor the right to demand such exemptions as the law might allow; before the sale, the family dwelling house was entirely destroyed by fire, and the debtor and his family removed from the premises without intending to rebuild the house; and thereafter the premises were sold under the decree for more than sufficient to pay the preferred liens. *Held*, 1. That there was no abandonment of the right to homestead, which continued in the debtor until the property was sold. 2. That out of the surplus after payment of the preferred liens, upon the application of the debtor's wife, an allowance should be made to her in lieu of the homestead, in analogy to the provisions of the homestead act in favor of debtors who are not the owners of homesteads. 3. The 4th section of the act of April 9, 1869, (66 Ohio L., 50) does not apply as against debts contracted before its passage; but independent of this section, the debtor's right to the exemption attaches to the surplus of the proceeds of such sale, as against creditors whose claims do not preclude the allowance of a homestead. Opinion by MCILVAINE, J.; OKEY, J., having been of counsel, did not sit in this case.—*Kelly v. Duffy.*

ABSTRACT OF DECIS ONS OF SUPREME COURT OF INDIANA.

November Term, 1877.

HON. HORACE P. BIDDLE, Chief Justice.
" WILLIAM E. NIBLACK,
" JAMES L. WORDEN,
" GEORGE V. HOWK,
" SAMUEL E. PERKINS,
} Associate Justices.

PROCESS—SHERIFF'S RETURN CONCLUSIVE.—The return of a sheriff to a summons is conclusive between the parties, and cannot be contradicted by parol evidence. Where the record in a foreclosure suit was given in evidence, and the plaintiff offered to prove by competent witnesses that, at the time of the alleged service of process upon her, she was in Illinois and could not have been and was not served with the process, the evidence was properly rejected. Opinion by WORDEN, J.—*Johnson v. Patterson.*

VOID JUDICIAL SALE—RECOVERY OF PURCHASE MONEY.—An action will lie to recover purchase money paid for real estate at a sheriff's sale, which has been set aside for irregularities. But the value of improvements made by the purchaser can not be taken into consideration in estimating the amount of his claim. Under the common law, one who make improvements in good faith on the land of another, in the belief that he was the owner of the land, had to lose his improvements in case the land was recovered from him by legal proceedings. It is only by virtue of the occupying claimant law, which is of statutory origin, that the occupant of land, under such circumstances, can recover any compensation for his improvements. Opinion by NIBLACK, J.—*Westerfield v. Williams.*

MARRIED WOMAN—ESTOPPEL IN PAIS.—Action to recover real estate. The court gave the following charge to the jury: "If you find that the plaintiff knew that the strip of land in dispute belonged to her, and she also knew that the defendant was erecting valuable improvements upon said premises in good faith, and under the belief that the same belonged to him, and she did not disclose her claims to him, then she is estoppel now to claim the land, although she was a married woman at the time." *Held*, the charge was erroneous. In the act concerning real property, it is provided that the joint deed of husband and wife shall be sufficient to convey the lands of the wife, but not to bind her to any covenant therein. In the act touching the marriage relation, it is provided that a wife shall have no power to encumber or convey her lands except by deed in which her husband joins. A married woman can not do indirectly what she can not do directly; can not do by acts in *pais* what she can not do by deed. She can not, by her own act, enlarge her legal capacity to convey her own estate. To say that a married woman may divest herself of the title to her land by an estoppel in *pais*, would be to overturn the statute. Opinion by WORDEN, J.—*Behler et al. v. Weyburn.*

QUERIES AND ANSWERS.

[In response to many requests from lawyers in all parts of the country, we have decided to commence again the publication of questions of law sent to us by subscribers. We propose to make this essentially a subscriber's department—*i. e.*, we shall depend, to a large extent, upon them to edit this column. Queries will be numbered consecutively during the year, and correspondents are requested to bear this in mind when sending answers.]

QUERIES.

15. WILL SOME READER HEREOF cite me to a well-digested and late case sustaining the rule that the assignee of a chose in action can only recover what he paid? READER.

16. NATIONAL BANKS—POWER TO TAKE A VALID MORTGAGE.—Can a bank, organized under the National Banking Act, take a valid mortgage (such as is in general use in the Western states, and which confers a lien only) upon real estate, as security for a debt concurrently created, or to secure future advances? We are aware that this question has been answered negatively by the courts, as in Kansas Valley National Bank of Topeka v. Rowell, assignee, etc., 2 Dillon, 371, and some other cases. But are these decisions well

considered. Does the term *mortgage*, as used in the Revised Statutes of the United States, sec. 5137, mean *any mortgage*, in the general and popular sense of that term, whether the instrument confers a lien merely, or whether it vests the fee in the mortgagee? Does not this term mean only such a mortgage as was known to the common law, and should not this section be construed accordingly and in harmony with Charles River Bridge v. Warren Bridge, 11 Pet. 545; Rice v. Railroad Company, 1 Black, 374-5? If the design of Congress in placing this restriction upon national banks was to keep them from investing the currency provided for distribution and circulation in real estate (and thus practically defeating the purpose of the legislature in providing a circulating medium), the reason for prohibiting investments in the common law mortgage, whether *vadium vivum* or *vadium mortuum*, is quite apparent. But why Congress should prohibit the taking of a security which in no sense invests the bank with the title, or in any manner compels it to look to the issues, rent and profits of the realty to meet the payment of either principal or interest on the loan, is not so apparent. The mortgage in use in the West in no sense conveys the fee. It but simply gives to the mortgagee a lien upon the property mortgaged with no right of possession in the mortgagee, and under which the holder can only enforce payment by proceedings in the courts, and by sale under its process. Why should such a security be held to be within the prohibition of the bankrupt act? Is this statute to mean a common law mortgage in one part of the country, and in another any instrument which confers a *lien* upon real property?

P. G. & P.

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17. In a Suit by an Administrator or executor in a justice court, can a debt, existing against his intestate or testator, and belonging to the defendant at the time of his death, be set off by the defendant, and judgment rendered in his favor for an excess? Such a judgment would, it seems to me, be in violation of sec. 8, art. 4, of the Administration Law, and would enable a creditor to pay himself to the prejudice of creditors entitled to priority, and even to the prejudice of the widow of deceased. Is Thomas' Admr. v. Dunnica, 15 Mo. 385. still the law?

D.

ANSWERS.

No. 3.

(6 Cent. L. J., 159.)

The answer of brother Bainbridge to question 3, 6 Cent. L. J., 159, would hardly seem satisfactorily compensatory to the individual aggrieved. There is a deeper—a bottom remedy, *i. e.*, trespass against all the individuals actively concerned in the matter, from the magistrate, prosecuting attorney, bailiff, down to the witness. Where there was no *jurisdiction*, and if the law was unconstitutional, it never existed at all, and all proceedings under it were void *ab initio*. Consequently everybody actively connected with it was a tort-feasor, jointly and severally liable to the person wronged. *Vide* all the English and American authorities, and you will find none to the contrary, but numberless in support; indeed, as often as the question arose. The legislature need not be called upon, except, perhaps, to indemnify persons who were innocently mulcted in damages.

S.

No. 11.

(6 Cent. L. J. 238.)

I would remark, in answer to "I's" query, that it seems to assume, as matter of law, what may be exceedingly questionable, viz.: that a judgment creditor stands, in respect of his lien, upon the footing of an innocent purchaser for value. It may be that, by force of the statutes of the state where "I" lives, such is the case. If not, we should strongly incline to the opinion that the grantee in the unrecorded deed will not be bound to submit to the demand of the judgment creditor in any sum; and, of course, the assignee of the judgment is in no better condition. But if by force of any particular statutes of that state, the lien of judgment has priority over that of the unrecorded deed, it is good to the full amount of the judgment, no matter what the judgment cost the present holder.

Indianapolis, Ind. Nathan Morris.

No. 11.

(6 Cent. L. J. 238.)

Assignee of Judgment, Plaintiff, v. Equitable, Prior, yet Unrecorded Rights, Defendants.—The weight of authority is with "I" on the proposition stated. His query is, What are the extent of the enforcible rights of the assignee of judgments v. prior, unrecorded, equitable rights? 1st. The assignee stands in the shoes of his assignor. Parsons Cont. 197. 2d. The *holder* of a judgment lien has a lien only on the *actual interest* of his debtor, though the debtor may appear to have an interest, yet if in fact he has none no lien attaches. The lien attaches to the *precise* interest of the debtor. A judgment lien on land is subject to every equity which existed against the debtor at the inception of the lien. Freeman on Judgments, secs. 356 and 357. 3d. If the owner of the equity referred to was to stand by and see the assignee of a judgment sell the land to an innocent purchaser, the equity of the purchaser would prevail over the "prior equity;" but if he purchased the land himself, his title would relate back to the judgment, and take title in accordance with his lien.

Subscriber.

No. 10.

(6 Cent. L. J. 238.)

A patent for land relates back to the date of the purchase, and is evidence of title in the patentee, from the date of the certificate of purchase. Covender v. Heirs of Smith, 5 Ia. 157; 3 Gr. (Ia.) 349. As between the government and an individual the title passeds whenever the patentee shall have complied with the conditions imposed on him, and nothing is left to be done, except for the government by a ministerial officer to perform a duty, viz.: deliver the patent. It is upon this principle that courts have sustained the power to tax land and upheld conveyances, where the power of taxation was sought to be enforced, and conveyances were made prior to the delivery of the patent.

Subscriber.

BOOK NOTICE.

Digest of Moak's English Reports. Volumes 1 to 15 inclusive, with a List of Cases Reported, Table of Cases Reversed, Overruled and Considered. By James Simmons. Also Digest of American Notes. By Nathaniel C. Moak. Albany, N. Y.: William Gould & Son. 1878.

Mr. Moak's English Reports embrace all the cases of interest reported in the English law reports, from the year 1872 to the present time. The book before us is, therefore, a digest of English case law for the past six years. It is more than that: for, in the careful and exhaustive notes, which abound in the fifteen volumes of his series, the editor has given a compendium of the case law of this country on the subjects treated which has greatly enhanced their value. Mr. Moak's plan of culling from the English reports everything of value to the profession on this side of the water was an excellent one, for the English reports are exceedingly expensive, and contain much law purely local. That in less than six years a digest is required is another evidence of the growth of case-law.

The volume contains 728 pages, and is printed on good paper and well bound. The titles are very nu-

merous, the cross references accurate, and the cases placed in their proper places. To those who possess Mr. Moak's series, the digest before us will be indispensible.

NOTES.

THE proposal to abolish the common law action for breach of promise of marriage, referred to in a former issue, is opposed on the ground, amongst others, that it is not peculiarly of common law origin. The action for breach of promise of marriage existed in Latium according to Aulus Gellius (lib. 3, Noct. Attic. cap. 4), and he refers in corroboration to the work of Servius Sulpitius, entitled *de Dotibus*. Servius states that this form of action was maintainable until and after the time when the Lex Julia conferred on all the people of the Latium the rights of citizenship. This action was also in vogue among the Romans. Simple consent, express or implied, was sufficient to constitute a cause of action in the event of a breach (Ulpiun, lib. 35, ad. Sab.). The canon law treated promises of marriage with great seriousness, even admitting that *in foro conscientiæ* spiritual compulsion might be employed to enforce performance; but in later times the rule was relaxed by the Pope, and damages adjudged in lieu. In Sweden the power to decree performance of a promise to marry was retained so late as the year 1810, when it was abrogated. The Oriental Church, following the Israelitish doctrine, viewed a breach of promise in the light of a breach of marriage. Concil. Trullana 692, can. 98. An action of this kind will lie, according to French law, provided special damage be proved. Code Nap., and decisions thereon. By the law of Italy, this right of action arises whenever the formalities specified in article 54 of the code are complied with. The Prussian code renders the breach of a legally constituted agreement to marry actionable, and, under certain circumstances, a penal offense.

A CORRESPONDENT writes: Are debts property? Is a trust deed a contract? Does a law and its construction, which, on contingency of the death of contract debtor, deprives the creditor of all remedy for the enforcement of his contract against the specified property, impair the obligation of the contract? What is the good of the provisions of section 10 of article 1 of the Constitution of the United States, so far as it affects Texas? Hear what the supreme court of that state says in Lane v. Pascal, 47 Tex. 370: Case, deed of trust on homestead, (lawful contract), wife joined husband in trust deed; husband died; widow claimed homestead in the mortgaged property. The court say: "The death of the husband did not revoke the power of the trustee to sell, but it can not be executed by the trustee, because in conflict with our probate law; and the mortgage can only be enforced through the courts. If homestead, the courts are prohibited from selling; it would be a forced sale. Expenses of last sickness, expenses of administration, expenses incurred in the safe-keeping and management of the estate, as well as allowances to be made to widow and children in lieu of homestead, and other property exempt from forced sale, where such property does not exist in kind, *have preference over specific liens* created in the life-time of decedent. Here, although the wife joined the husband in the deed of trust, as the power to the trustee is revoked, the property can only be now sold by order of the court. But this would be a forced sale, and if the property is homestead the court is forbidden by the constitution from having it thus sold." And thereby, if the estate is insolvent, the woman is relieved from a contract which was absolute and binding upon her while her husband was living, but takes an absolute title to the property, notwithstanding the incumbrance with which she has freely and voluntarily joined her husband. If debts are property of the creditor, and liable to be assessed to him as property, on which he must pay taxes, is not this a law which takes one man's property and gives it to another? Yet this is the declared law of a state of the United States. The law and its construction annihilates his remedy, and his own wife and family may starve from the loss of the debt.

IN a paper on Negligence, a writer in the *Law Times* observes that to define with precision the expressions "fellow-servant" and "fellow-workman" is a matter of no small difficulty. It may, however, be said that the authorities go to the length of the proposition that those only are to be considered as fellow-servants who are employed by the same master, and engaged in a common employment. Warburton v. Great Western Railway Company, L. Rep. 2 Ex., 30; Vose v. Lancashire and Yorkshire Railway Company, 2 H. & N., 728. But workmen employed by a contractor, and workmen employed by a person or company who has employed such contractor, are considered as being in the same common employment and fellow-servants. Murphy v. Caralli, 8 Ad. & L., 109; Murray v. Currie, L. Rep., 6 C. P., 24; see per Cockburn, C. J., in Woodley v. The Metropolitan Railway Company, 36 L. T. Rep. N. S., 419. The following instances were given in a Scotch case of the absence of such common employment: 1. A dairyman, in bringing milk home from the farm, is carelessly driven over by the coachman. 2. A painter or slater is engaged at his work on the top of a high ladder placed against the side of a country house, and is injured by the carelessness of the gardener, who wheels his barrow against the ladder and upsets it. 3. A clerk in a shipping company's office, sent on board a ship belonging to the company with a message to the captain, meets with an injury by falling through a hatchway which the mate has carelessly left unfastened. 4. A plowman at work on land held by a railway company, and adjacent to a railway is, while in the employment of the company, killed by an engine, which, through the default of the engine-driver, leaps from the line of rails into the field. M'Norton v. Caledonian Railway Company, 28 L. T. Rep. N. S., 376. The following have been held to be fellow-servants, the workmen injured, and the workmen through whose negligence the injury happened, being in the employ of the same master: 1. A laborer traveling by a train by which it was his duty to travel, and the guard through whose negligence the laborer was injured. Tunney v. The Midland Railway Company, L. Rep. 1 C. P., 291. 2. The driver and guard of a stage-coach; the steerman and rowers of a boat; the men who draw the red-hot iron from the forge, and those who hammer it into shape; the engineman and the switcher; the man who lets the miners down and winds them up, and the miners. Suggested in Barton's Hill Coal Company v. Reid, 3 Macq. H. of L. Cas., 266. 3. A scaffolder and the general manager of the common employer. Gallagher v. Piper, 16 C. B. N. S., 669; 33 L. T. Rep. C. P., 329. 4. A carpenter employed for the general purposes of the company and the porters. Morgan v. Vale of Neath Railway Company, L. Rep. 1 Q. B., 149; affirmed 33 L. T. Rep. Q. B., 260. 5. The guard of a train and plate-layers. Waller v. The Southeastern Railway Company, 32 L. J., 205, Ex.; L. T. Rep. N. S., 325. 6. A laborer employed to do ballasting and a plate-layer. Lovegrove v. The London, Brighton and South Coast Railway Company, 33 L. J., 329, C. P.; 16 C. B. N. S., 669.